SUPREME COURT, U. S.
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No. 928

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM ANDERSON and HAROLD MOFFETT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners' Reply

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

We are offended by the Government's presentation in this Court.

And although we retain few illusions after carrying this case as far as it has gone, we are nonetheless saddened by that presentation.

Obviously, the Government brief is based on an uncritical acceptance of the statements made by the local prosecutor

in the courts below. There cannot have been an independent examination of that record. For the Government has done before your Honors, precisely what it did in the courts below: Take the bare bones of the Moffett transcript; add to it those portions of the Anderson transcript which do not contradict Moffett; and flatly invent the remainder necessary to bridge the two cases.

The result, is falsity.

FALSELY, the Government contends (G. Br. 4) that it was not until Moffett departed at 6:20 that Tucker and Pendleton returned to the Grand Prix "where they talked briefly to Petitioner Anderson" who departed at 6:30. That, in the teeth of Tucker's testimony against Anderson, that he spoke with him continuously for 30 or 40 minutes (A. 6) commencing with his arrival at the Grand Prix about 6:00 p.m. and ending when Anderson departed at 6:30 (A. 6).

FALSELY, the Government advises this Court that the Anderson sale was completed at 7:55 and that the agents returned to the Subway about 8:00 p.m. "after a brief delay during which the agent performed a field test on the heroin." (G. Br. 4, 5). That, in the face of the clear agent testimony against Anderson that Anderson arrived at the rendezvous at 7:55, but that Tucker did not arrive until 8:00 (A. 6, 7, 8, 10). And there was no "brief delay". Instead, the agents drove two cars to a rendezvous a mile and a half away. They met, tested the substance supposedly obtained, and then searched both the informant and the informant's vehicle (A. 4, 7, 8; Anderson Tr. 14). It was only then that they could have returned to the Subway

Lounge. But the Government blithely assures your Honors, FALSELY, that the transfer took place at 7:55 (although nobody so testified) and that "after a brief delay" the agents were back at the Subway Lounge by 8:00 (G. Br. 4, 5).

It is by such misrepresentations as those, that the Government becomes enabled to reconcile the transcripts of the two cases.

Our claim of denial of rights under the *Jencks* statute is relegated to a footnote at page 7 of the Government's Brief. There the Government advises your Honors, quite incorrectly, that the issue was not raised below. The original motions clearly raise the issue. Each petitioner flatly complained that he had wrongly been denied access to impeachment material at his trial, in just those words. Each not only charged withholding of exculpatory evidence in general terms [Par. 9 (b) of each original Motion], but each also specifically claimed that he had been denied the right to use as impeachment material, the agents' story disclosed at the trial of the other [Par. 9 (i), Moffett Motion; paragraph 9 (h), Anderson Motion].

While it is true, that the Government says, that the question was not "treated" seriously by the court below, it was vigorously raised there, by Brief, oral argument, and Petition for Rehearing. The *Jencks* issue was timely raised at all stages of the proceedings, and is most assuredly not, as the government would suggest, an afterthought.

We are particularly bemused by the Government's suggestion that the impeachment material does not fall within the *Jencks* act. The Government says that under the *Jencks* act, we are entitled only to statements "which relate to the subject matter as to which the witness has testified". It argues (Br. 7, Fn. 4) that if a witness once said he

was doing, at the time in question, something other than what he claims to have done by his trial testimony, this does not "relate to the subject matter of his testimony". In other words, the Government contends, essentially, that a defendant is entitled only to those witness statements which correspond with the witness' present testimony. Had we not seen that argument, we would not have believed that it was made.

* * *

In our original petition, we confessed an inability to find any case in which a movant charging federal perjury, had ever received relief or even an acknowledgment that he had stated a cause of action. It is now clear why that fact obtains.

This litigation is now only one tenuous step — "cert. den."— from being casually swept under the rug, in disregard of incontrovertible proof that movants are in jail because of government perjury.

We have made the most serious accusation that a citizen can make against his government. We believe we have documented our position. The government has denied our contention; but the government has *not* documented its position.

Nor could it.

The only honorable way to resolve this issue, is by the type of inquiry which your Honors made in *Miller* v. *Pate*, 386 U.S. 1. Federal perjury should be judged by no different standard from state perjury. In this case, as in *Miller*, your Honors will find the airy and generalized contentions of the prosecution "totally belied by the record." In this case, as in that one, your Honors will conclude: "The prosecution deliberately misrepresented the truth."

And sorrowfully, we advise that your Honors will reach that conclusion not only with respect to the proceedings at the original trial, but as well with respect to the motions for relief, at nisi prius, on appeal, and lamentably, on certiorari.

Presumptively proceeding with a sense of responsibility equal to that of any other lawyers practicing in this Court, we advise your Honors that the record belies the assertions of fact made in the government's opposing Brief.

We regret that in this Court of ultimate review, such an assertion must be made.

We pray that your Honors will consider this issue sufficiently grave, to warrant a full hearing.

* * *

We do not presume to say what your Honors should do. But we will express our firm belief that if ever the integrity of the judicial system cried for a grant of certiorari, that cry is audible here.

Respectfully submitted,

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